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No. 97-674

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOAN CAROL LIPIN,

Petitioner,

—v.—

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH and BARBARA E. FLETCHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. CERTIORARI IS NEEDED TO PRESERVE DUE PROCESS AND EQUAL PROTECTION RIGHTS IN CONSIDERATION OF MOTIONS TO DISMISS

Respondents' brief in opposition to the petition for a writ of certiorari misleads by contending that the Second Circuit's two conflicting non-publishable decisions constituted "simply" a so-called "straightforward" application of New York's "settled" claim preclusion law. (Brief, p. 8)

Each of the quoted words in the foregoing from the brief is hyperbole and exaggeration that is "simply" wrong, as is the further contention that the petitioner's claims involving "the scope of the attorney client privilege and alleged misconduct by the defendants and their counsel" were "extensively litigated and conclusively settled. . . ." (Br. p. 7)

In fact nothing was ever "litigated" at all, in any meaningful sense of the word, and therein is centered the basis for the petition herein.

Missed entirely in respondents' brief is the issue regarding a federal right that has been obstructed in its application by virtue of federal privilege rules not recognized in a state court.

Unless review of the issues raised in the petition for a writ of certiorari is granted, potential plaintiffs will be dissuaded from resorting to state courts for the assertion of employment cases involving federal civil rights claims because of the jeopardy in which they may be placed by the non-application of federal privilege law contrary to Rule 501 of the Federal Rules of Evidence.

Respondents' assertion that the petition "does not identify any important question of federal law that has not been, but should be settled by this Court," and "makes no effort" to address considerations governing review on certiorari set forth in this Court's Rule 10 (Br. pp. 5, 6) is an example of

rhetorical excessiveness that assumes either (a) that the petition will not be read, or (b) disregard of the fallacy that the obvious uncertainty in the waffling of the Second Circuit in its affirmance of the dismissal of petitioner's two actions with multiple claims on the basis of two conflicting non-publishable opinions clearly negate respondents' assertion that "simply a straightforward application of New York's claim preclusion law" (Br. p. 8) was all that was involved, or (c) disregard of the extreme superficiality of the treatment below on a motion to dismiss will be of no concern to this Court in its supervisory role in the administration of justice, contrary to Rule 10.

It is submitted that an interpretation of state legislation regulating discovery to preclude prosecution of far different and distinct claims subsequently pleaded in federal court, as described in the petition herein, fits into the classic definition of a bill of attainder as an act that may affect the life of an individual, or may confiscate her property, or may do both, as here, that the Constitution prohibits to both state and federal governments (Art. I §§ 9, 10) who are deprived of rights without any of the forms or safeguards of trial, or without consideration of the sufficiency of the proof produced, whether conformable to the rules of evidence or not, or that fixes the degree of punishment in accordance with its own notions of the enormity of the offense. See Cummings v. Missouri, 71 U.S. 277, 323 (1867); Fletcher v. Peck, 10 U.S. 87, 138 (1810).

The result is the antithesis of justice rather than its embodiment; the very documents that caused petitioner's litigation to be consigned to a jurisprudential black hole of irretrievability themselves constitute the best evidence of the unconstitutional infringement of her civil rights.

The misleading nature of the answering brief is shown by the fact that a controlling federal statute governing one of petitioner's most important claims, 42 U.S.C. § 1986, cited

seven times in the petition (pp. 2, 5, 10, 11, 15, 16, 21), is not referred to even once by respondents.

Conversely, unlike Migra v. Warren, 465 U.S. 75 (1984), on which respondents do rely (Br. p. 6), the instant case involves claims that could not have been pleaded in the state action because they did not accrue until the documents containing evidence of such unlawful conduct were placed in the plain view of petitioner. (Pet. p. 15)

Thus, unless the petition is granted, petitioner's claims thereunder will be extinguished without a hearing on the merits ever having been afforded, a drastic difference from the situation in Migra, supra, in which the plaintiff in fact had been awarded reinstatement and compensatory damages in the state court action instead of having it dismissed out from under her without any consideration of the merits having been ever afforded. (465 U.S. at 80.)

II. RESPONDENTS' CASES SUPPORT PETITIONER

Similarly inapposite are the cases relied upon by respondents in connection with their assertion that the pre-trial dismissal of litigation does not "implicate" a violation of any constitutional rights. (Br. p. 7, fn. 7)

On the contrary, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909), holds is that due process is not implicated only when the dismissal is due to "a failure by the defendant to produce what we must assume was material evidence in its possession," a very different situation from one in which the documents produced, through carelessness or worse, themselves are evidence of respondents' responsibility for unlawful conduct.

Carefully distinguishing from a penalty dismissal such as is involved here, the Court stated that "the generating source of the power was the right to create a presumption following from the failure to produce." (212 U.S. at 351; emphasis added.)

The difference between that case and this is put into sharp focus by the following statement in Hammond Packing Co. (212 U.S. at 351):

> "The difference between mere punishment, as illustrated by Hovey v. Elliott, [167 U.S. 409 (1897)] and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other." (Emphasis added.)

III. INDICATIONS OF JUDICIAL DISFAVOR TOWARD SEXUAL HARASSMENT CASES CONFIRMS THE IMPORTANCE OF SUPERVISORY REVIEW

The superficial treatment of the sexual harassment claims of petitioner by the courts below warrant review because of the importance of such issues under Rule 10 in exercise of the Court's supervisory power.

The non-recognition of the disputed fact issues presented in determining a motion to dismiss in favor of respondents is indicative of the general disfavor of such litigation that has

been reported to exist in the federal judicial system. See Garland, "Courts Behaving Badly -- Task forces say some judges impatient with job bias cases," ABA Journal, November 1997, p. 30. The Garland article singles out the Second Circuit for the following comment (id.):

> "Judges' beliefs that employment discrimination is too trivial for their attention, the 2nd Circuit task force wrote, could 'easily translate into actual unfairness to a litigant.' Indeed, several appellate court opinions hint that District Court judges showed 'stereotyped thinking about the seriousness or the reality of sexual harassment claims,' the task force wrote."

Pertinent portions of the Second Circuit's Task Force draft report on "Gender, Racial, and Ethical Fairness in the Courts" dated June 5, 1997, are set forth in the Appendix.[1]

As stated in the Second Circuit Task Force Preliminary Draft Report on Gender, Racial, and Ethnic Fairness in the Courts dated June 10, 1997, pp. 88-89 (376a-377a):

> ". . . the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in particular, accounted for many of the specific complaints and comments that were received." (Footnote omitted; emphasis added.)

Appendix A to the Task Force's Preliminary Draft Report

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[1] Citations 375-399 followed by the suffix "a" refer to the Appendix annexed hereto.

provides detailed information concerning the institutional bias afflicting sexual harassment claims in the Second Circuit. (380a-399a)

Among the surprising data presented are the statistics showing that the reversal rates in employment litigation in the Second Circuit in 1995 and 1996 are less than half the reversal rates experienced in all civil litigation, and far below the reversal rates experienced nationally in employment litigation. (389a) The Task Force also noted the disturbing fact that the reversal rates in employment litigation in the Second Circuit have shifted "quite dramatically" in recent years, and that the Second Circuit is now inexplicably reversing "a much smaller percentage of employment cases when compared to civil cases generally." (388a-389a)

The Task Force focused on indications of "a variety of disturbing stories" that surfaced in hearings and in focus groups concerning sexual harassment cases. (390a-392a)

In addition, the Task Force also considered the treatment received by sexual harassment cases in the Second Circuit from 1990 through 1996. (392a-394a) Based upon the data derived from computerized research, it found that fully half of the cases had been disposed of either on a motion to dismiss (as here) or on a summary judgment, a result it found to be "somewhat surprising" since such cases are generally agreed "to involve a high level of factual complexity" (also as here). (394a)

The Task Force also found that the defendants prevailed in 66.6% of the cases at the trial court level, and in fully 91.6% of those decided on dispositive motions. (394a)

However, "Where the cases went to trial, plaintiffs won in seven and lost in five; but consistent with other reports, plaintiffs did markedly better before a jury than a judge."

(394a; footnote omitted.)

The Task Force also stated that it found evidence of "an unsympathetic and dismissive attitude toward the legitimacy of their claim on the courts' time and attention," and that such attitudes "sometimes do taint the proceedings" as a result of both "impatience" as well as "stereotyped thinking on the part of the judges about the seriousness or the reality of the sexual harassment." (396a-397a)

The conclusion of the Second Circuit Task Force's Preliminary Draft Report (Appendix A; 380a) is that a judge's belief that a case "is too trivial for his or her attention can easily transmute itself into actual unfairness to a litigant - in this instance, a result that disproportionately disadvantages both women and members of minority groups; this is a problem that deserves attention." (399a)

Petitioner therefore respectfully submits that the problems raised herein similarly "deserve attention." Due process is at least as "due" in a case involving penalty dismissal of sexual harassment and denial of equal protection claims that should not have been accorded preclusive effect by federal courts on a motion to dismiss.

A clear conflict with state law under which the discovery of such evidence that caused the dismissal of the state litigation was considered to be "heinous," the principal contention relied upon in respondents' brief (Br. pp. 1-5), is clearly presented. Under federal law, it is "heinous" instead to suppress evidence directly probative of petitioner's claims, particularly when insufficient precautions were taken by respondents to preserve its confidentiality. In re Horowitz, 482 F.2d 72, 80-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

Respondents' contention that petitioner should have sought

certiorari for such a decision centered upon state procedural law (Br. p. 7), when a separate claim based on 42 U.S.C. § 1986 was directly made available to petitioner as a matter of federal law, as to subsequent acts that were not and could not have been asserted in the state litigation, misses the point entirely.

Under 42 U.S.C. § 1986, an affirmative duty is imposed upon "One who knows of and has the ability to aid in preventing a § 1985 conspiracy . . . to do so." Wahad v. Federal Bureau of Investigation, 813 F. Supp. 224, 232 (S.D.N.Y. 1993).

The underlying purpose of Section 1986 is for "every person" with evidence of the existence of such a conspiracy to violate civil rights to come forward with such evidence so that it may be used in order "to prevent or aid in preventing the commission of the same . . .," and a cause of action for damages to be "recovered in an action on the case" is explicitly granted for that purpose. (42 U.S.C. § 1986.)

Together, Sections 1985 and 1986 are a clear expression of the overriding federal interest in the exposure of conspiracies to deprive individuals of their civil rights so that the infliction of further injury may be prevented.

The courts below failed to consider that no state procedural rule may be used to negate or override the federal mandate of Sections 1985 and 1986.

The Constitution prohibits what the courts below permitted -- interference with the prosecution of federal civil rights guarantees applicable to sexual harassment claims on the basis of the penalty dismissal of a state action for infraction of state discovery rules inconsistent with federal privilege rules, thus giving rise to a "clear collision" between state and federal law.

Hamm v. City of Rock Hill, 379 U.S. 306, 311-12 (1964), indicates that the civil rights laws prohibit

> ". . . the application of state laws in a way that would deprive any person of the rights granted under the Act. The Supremacy Clause, Art. VI, cl. 2, requires this result where 'there is a clear collision' between state and federal law, Kesler v. Department of Safety, 369 U.S. 153, 172 (1962), or a conflict between federal law and the application of an otherwise valid state enactment, Hill v. Florida, 325 U.S. 538 (1945)."

This Court has made it clear that factual determinations of a kind never undertaken in this litigation are required to determine whether such communications were or were not of such a nature to be accorded privileged status. See Upjohn Co. v. United States, 449 U.S. 389, 394-6 (1981).

In addition, the principle that factual determinations of a kind never made here as to whether a claim of confidentiality was waived by careless handling is firmly embedded in federal law. See Eigenheim Bank v. Halperin, 598 F. Supp. 988, 991 (S.D.N.Y. 1986); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-5 (E.D. Mich. 1954).

The existence of a sustained and deliberate campaign to deprive petitioner of her federally guaranteed right to a remedy for the infliction of repeated outrages in the form of sexual harassment and denial of equal protection is alleged in the first federal action. Such outrages are all the more odious because they were perpetrated under the cognizance of the Red Cross by a chief executive officer who is alleged to have administered the agency more in the nature of his own private harem rather than as an instrumentality of the federal government.

Petitioner's actions were required by and protected under the federal civil rights laws, and the exercise of her duties accordingly were in the true best interests of the Red Cross. Under federal law, there can be no doubt that petitioner was legally and ethically bound to seek to stop respondent Bender and the other co-conspirators from violating the civil rights of herself and others similarly situated.

The very documents that respondents have suppressed themselves reveal the public interest involved in such a remedy. The constitutional and statutory purposes of 42 U.S.C. §§ 1985 and 1986 therefore will be confounded unless this Court grants the petition herein.

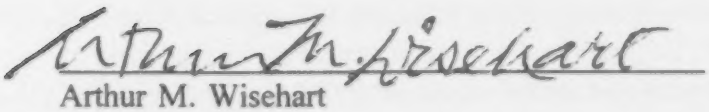
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 1, 1997

Respectfully submitted,

WISEHART & KOCH



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APPENDIX

PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

June 10, 1997

Hon. Sharon E. Grubin
Co-Chair

Hon. John M. Walker, Jr.
Co-Chair

Hon. John T. Curtin
Hon. Sterling Johnson, Jr.
Hon. Constance Baker Motley
Hon. Sonia Sotomayor
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Members

C. Employment Discrimination Litigants

As we have stated, a study of case outcomes is not included in this report. However, we note here that some aspects of the Committee Report concerning treatment of litigants in employment discrimination cases are not dependent on case outcomes.

During the course of the Committees' study, some preliminary indicators of less than fair treatment of litigants in employment discrimination cases surfaced. First, the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in

[89]

particular, accounted for many of the specific complaints and comments that were received.[81] At hearings and in focus groups various disturbing stories were related. In rare instances, openly discriminatory statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another, a judge was alleged to have inappropriately conveyed through his facial expressions and words utter skepticism about the validity of the

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[81] Not every sexual harassment claim is made in the employment context, however. Some, for example, have also come from prisoners accusing guards of harassing them or from students in academic institutions.

plaintiff's claim. Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

Second, some judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases.[82] Others expressed concern that rapidly growing caseloads, due in part to increasing employment litigation, will require an increased number of judges, destroying the collegiality

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and cohesiveness of the federal bench.[83]

Finally, in the Committees' view, several appellate opinions hint that some trial judges have exhibited impatience

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[82] It is true that these cases draw heavily on the time of the judiciary. From 1970 to 1989, the number of employment discrimination cases filed in federal courts increased by 2166%, as compared with a 125% increase in the overall civil caseload. Today, employment discrimination matters account for about 10% of the total caseload in the Southern District of New York.

[83] The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies, including litigation involving "economic or personnel relations or personal liability arising in the workforce."

with employment discrimination claims, as well as stereotyped thinking about the seriousness or the reality of sexual harassment claims. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who got promotions and pay raises during the period in which her supervisor demanded sexual favors could nevertheless have suffered legally cognizable emotional injuries. In another instance, a district court's handling of a case suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge made known his impatience with a sexual harassment claim by unexpectedly awarding summary judgment to the defendants on the merits -- a ruling requested by neither side -- despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

These preliminary indications in the Committees' study raise a concern that, when an employment discrimination case is properly before a federal court, a judge's belief that the matter is too trivial for his or her attention may too easily translate into actual unfairness to a litigant as the case proceeds through the system in a form that disproportionately

[91]

disadvantages both women and members of minority groups. Whether this concern will prove to be well founded must await further study elsewhere. However, whatever the reasons underlying the reported dislike by judges of employment discrimination cases, it is important for judges to assure that these cases are not treated with less than the uniform seriousness and respect that litigants deserve. As Judge Edward Weinfeld used to so aptly remark: no case is less important to the litigants involved than another. Furthermore, all judges

should be careful to avoid any remarks or visible reactions that, even if innocently intended, might understandably be perceived by litigants as reflecting biased treatment.

Conclusions:

From the data discussed in Chapter Seven, we reach the following conclusions:

a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.

b. The availability and adequacy of interpretation services in civil cases initiated by private parties need study.

c. Assistance to pro se litigants, while adequately serving the needs of these litigants in general, varies in kind and degree among the courts within the circuit, and a better exchange of information between courts is needed.

d. The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

APPENDIX A to the Preliminary Draft
Report of the Second Circuit Task Force
on Gender, Racial, and Ethnic Fairness
in the Courts

DRAFT REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

Gender Committee
John H. Doyle, Co-Chair
Bettina B. Plevan,
Co-Chair

Diane L. Zimmerman,
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Racial and Ethnic Committee
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HectorWillems Rodriquez,
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Draft: June 5, 1997

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VII: The Litigants

EMPLOYMENT DISCRIMINATION

An area of litigation that generated a large number of spontaneous complaints and concerns was employment discrimination - a category in which minorities and women make up a high percentage of the litigants. Although various specific problems surfaced in focus groups and other settings, the common refrain that summed them up was that judges "don't like" these cases. One attorney reported that a federal judge referred (rather pungently) to her role as legal counsel in discrimination cases as "skunk work." When judges and attorneys, including those otherwise

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enthusiastic in their praise for the generally high standards of fairness observed in federal courts, were queried about the accuracy of the assertion that employment cases are disfavored, many agreed with the proposition. One white male lawyer who does not himself practice employment discrimination law, summed up the problem as follows: "You constantly hear judges say that there are whole categories of cases that don't belong in federal courts....I think if you polled judges, you would find that they think discrimination claims are the most dubious of the cases that actually go to trial. It surely seems that federal judges don't like them, and I wonder how this affects the perception that potential litigants have of the fairness of the courts."

Because of the frequency of such comments, and the fact that the both the Ninth Circuit gender and the District of Columbia Circuit race and gender studies identified employment

discrimination cases as a significantly problematic area, the Committees took a variety of approaches to investigating the question of fairness to litigants in these cases. Two focus groups made up of attorneys representing both plaintiffs and employers were conducted to get the sense of those most familiar with these cases. Questions about the treatment of employment discrimination cases were asked during interviews with a sampling of judges; an attempt also was made to inquire into the attitudes of judges through the judicial questionnaire. Preliminary examinations of empirical data were made to look for any available clues about the possibility that the "dislike" was real and that it might translate somehow into unfairness in the handling of the cases. It is important to stress what is meant by fairness in this context. We do not mean the fairness of rules of substantive law applied by the courts of the Second Circuit. Rather, we mean to ask if, within the confines of applicable law,

[182]

these cases receive evenhanded and unbiased hearings on a level comparable to, for example, a contracts or a securities or an intellectual property case.

We start by noting that, to the extent that judges in fact do dislike employment discrimination cases - a proposition we could not explore directly[256] or comprehensively - a variety

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[256] The Committees initially proposed asking judges to indicate which of a wide range of types of cases they preferred not to handle. Among the categories, employment discrimination was to be listed. Because objections were raised by members of the court on the grounds that the question might be suggestive, the questionnaire was instead changed to ask judges whether certain categories of cases ought not to be handled in federal courts and if so, which ones. About 30%

of explanations can be posited. Some judges attribute the unhappiness with the cases to the fact that plaintiffs in them often appear pro se, and do not understand the law or the court's procedures. Many federal judges also appear to believe that the proliferation of small cases involving individual claimants clog up the federal courts and divert the attention of judges away from larger, purportedly more significant civil cases. Others express concern that rapidly growing caseloads demand larger and larger numbers of judges and destroy the collegiality and cohesiveness of the federal bench. The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies. This recommendation obviously would affect more than employment litigation. However, it is also true that prominent among the recommendations in the report was a specific one that cases involving "economic or personnel relations or personal liability arising in the workforce" be among those largely eliminated from federal litigation.[257]

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Some insight into other reasons for the apparent negativity of some judges toward employment discrimination cases can be gained from an article that appeared three years ago in a New

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responded that there were such cases but only 13 judges actually identified what they were, a number too small to yield meaningful information.

[257] Another target of the report was diversity cases, again often involving individual claimants in tort suits. Interestingly, these are another category of federal cases in which minorities and women are also believed to be more heavily clustered.

York newspaper. The author, a former federal judge, complained that discrimination cases are an unjustifiable consumer of judicial time because they are:

> rarely settled, are characterized by high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.

Other judges privately agreed that this article captured the views of colleagues who thought the cases too resistant to settlement and too "small potatoes." Others, however, characterized the problem a bit differently, pointing out that, in their experience, the strongest cases do settle, leaving the least meritorious claims for trial.

Certainly, the claim that these cases draw heavily on the time of the judiciary is not exaggerated. From 1970 to 1989, the numbers of such cases filed in federal courts increased by 2,166%, as compared with a 125% increase in the overall civil case load.[258] This increase has been explained by a number of factors, including the broadening of protected classes, the dips in the health of the overall economy, the increase of women in the workforce, and the increased expectations on that part of younger workers that they will be treated fairly.[259] Today, as noted earlier in this Report, about 10% of the total caseload in the Southern District of New York, is made up of

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[258] J. Donohue & P. Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 985 (1995) [hereinafter Changing Nature].

[259] Id. at 990-99.

employment cases.[260]

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However, the concerns that emerged were not only related to judicial efficiency. One judge reported that colleagues criticize the employment discrimination area as "highly emotional," and speculated that highly emotional might well be a code phrase for "female." Whether the gender (or the race) of the litigant in itself plays a direct role for some judges in how they think about these cases - remembering, of course, that white men bring a substantial number of age discrimination

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[260] Employers share the concern about the numbers of employment discrimination cases, and have turned in substantial numbers in recent years to requiring new employees to agree that any discrimination claims will be handled by binding arbitration. Because of serious uncertainty about the reviewability of decisions by arbitrators, even in situations where the arbitration result is a deprivation of the benefits of federal law or where the outcome itself seems infected by racial, ethnic or gender stereotyping, these agreements are a matter of considerable concern. At least one such case has come before the Second Circuit; in that case, an arbitrator reinstated an employee who had been fired for sexually harassing a colleague. The district court found public policy to be a justification for reviewing the arbitration decision, and the Second Circuit affirmed. Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991). A full examination of the relationship between mandatory arbitration and the problems discussed in this report was not undertaken. For an excellent discussion of the problems with arbitration of employment discrimination cases, see Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

cases - there is reason to suspect that the changing nature of employment discrimination claims could play a role in shaping negative judicial attitudes.

In the early years of Title VII, when litigation focused on employers who refused to hire women or minorities for certain jobs (or altogether) the issues were considerably more clear-cut and the inequities more apparent. Today, however, factually more complex claims make up the bulk of the litigation: suits over firings and lay-offs, failure to promote or sexual harassment.[261] Some evidence exists that these sorts of claims may be greeted more skeptically by judges than are failure to hire cases. In fact, judges would seem to be more doubtful about them than are lay jurors.

[185]

According to one recently reported statistic, plaintiffs in employment discrimination cases are almost twice as likely to win before a jury as they are in a bench trial.[262]

Although this disparity is subject to many interpretations, at least one plausible explanation is that judges, removed as they are from contact with the day-to-day operation of the business world, are less sympathetic than are jurors to the complexities

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[261] The study by Donohue and Siegelman, for example, showed that, whereas in the late 1960's, hiring cases greatly outnumbered firing cases, by the late 1980's firing cases outnumbered hiring cases by six to one. Changing Nature, supra, note 258, at 1015.

[262] Allen Myerson, As Federal Bias Cases Drop, Workers Take Up The Fight, N.Y. Times, Jan. 12, 1997, at A1, 14.

of current workplace relationships. Another explanation sometimes offered is that the women and minorities who make many of these claims come across to judges as less credible witnesses than do white men testifying in commercial cases.[263] Lynn Hecht Schafran relates a story about how credibility can be mis-evaluated that demonstrates the possible problem. She tells of a male attorney who almost turned down what turned out to be an important employment discrimination case because, at first hearing, he wrongly interpreted the client's intense psychic distress at the outrageous treatment to which she had been subjected as evidence of hysteria or mental illness.[264]

All of these considerations, collectively, suggest that it would be worthwhile to consider whether employment discrimination litigants receive equitable treatment in the courts of the Second Circuit. The Committees hope that it will be possible in the future to undertake more empirical studies to help clarify some of the questions raised in this Report. One useful avenue for research

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[263] Credibility problems for women as compared with white men have been recognized in a number of settings. See, e.g., Reiko Hasuike, Credibility and Gender in the Courtroom, in The Woman Advocate: Excelling in the 90's (1995); Note Gender and the Role of Expert Witnesses in the Federal Courts, 83 Geo. L. J. 635 (1994); Lynn Hecht Schafran, Credibility in the Courts: Why is There a Gender Gap? The Judges' Journal 5 (Winter 1995).

[264] Lynn Hecht Schafran, Is the Law Male?: Let Me Count the Ways, 69 Chi.-Kent L. Rev. 397, 404-05 (1993).

would be to compare the relative generosity of judges in making fee awards in employment cases as compared with fee awards in otherwise comparable nondiscrimination cases. We were not able to do this study within the time available to us; we did, however, look at two other rough measures - overall reversal rates and the disposition of post-verdict motions in jury trials.

Although overall reversal rates in employment cases are not deeply informative - statistics alone do not indicate, for example, who was favored by the reversal or the circumstances that prompted it - the numbers could give some indication of whether trial court determinations in these cases are any more or less likely to be error-prone than determinations in civil cases generally. As it turns out, the picture we found is complex and puzzling.

Overall, the Second Circuit is less likely than the average Court of Appeals to reverse any civil case appealed to it, including an employment discrimination case.[265] But the relationship in the circuit between rates of civil reversal generally and rates of reversal in employment cases specifically has shifted quite dramatically over recent years. In the early

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[265] Looking at the period from 1990 through 1996, the percent of decisions in all civil cases reversed on appeal in the federal courts nationwide was 12%; in the Second Circuit, the comparable figure was 9.8%. Nationally, federal appellate courts reversed 11.2% of employment cases on the merits, whereas the rate for the seven years at issue in the Second Circuit was just under 10%. Source: Administrative Office of the U.S. Courts.

1990s, the court was markedly more likely to reverse in employment cases than in civil cases generally, whereas, over the last three years, the circuit has reversed a much smaller percentage of employment cases when compared to civil cases generally.

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TABLE 25: Reversal Rates in All Civil and in Employment Appeals

Court and Type of Case	1996	1995	1994	1993	1992	1991	1990
2d Circuit - All Civil Appeals	7.4%	8.9%	10.9%	10.7%	11.4%	8.9%	11.3%
2d Circuit - Employment	3.7%	2.9%	7.3%	13.9%	14.5%	20.5%	13.3%
National - All Civil Appeals	10.6%	10.8%	12.1%	11.3%	12.9%	13.4%	13.7%
National - Employment	9.8%	10.5%	10.1%	11.1%	11.3%	13.3%	13.2%

As the above Table 25 demonstrates, the shifting pattern of reversals in the Second Circuit varies markedly from the national pattern in which the relationship between the two categories remained fairly constant. Further study is needed to understand why the shift that can be seen in the Second Circuit has taken place. One hypothesis would be that trial court judges in the circuit have simply become better in recent years than district court judges nationwide at handling these cases.

The second indicator examined was the disposition of post-verdict motions. Because employment discrimination cases can now be tried to a jury, and because statistical evidence suggests that juries are more favorable to plaintiffs in these cases than are judges, we looked at a sampling of cases to see whether defense motions for a judgment notwithstanding the verdict (j.n.o.v.), for remittitur, or for a new trial fared better in employment than in other types of cases. The Committees' attention was drawn to this subject in part because success on such motions is not routine, and yet we were aware that defendants had prevailed in a number of such motions in recent

years.[266] A computerized search was done, therefore, to identify all reported cases in which a motion for a j.n.o.v., a new trial or remittitur was made during a period of about two-and-a-half years, and the outcomes in employment and non-employment cases were compared. Although there were some disparities in rates of grants and denials, the numbers of employment cases in each category during

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the time period of the study were so small that no conclusions could be drawn.[267] Overall, neither of these preliminary examinations provide clear evidence one way or the other about whether, as a general rule, judges are more harsh or more error-prone in their management of employment cases than they are in other forms of civil litigation. These are areas for potentially useful additional research.

The final area subjected to preliminary examination was that of sexual harassment litigation. The reason for singling out these cases was that they were the ones that, upon analysis, accounted for the bulk of the specific complaints and comments of attorneys (and in some instances, litigants) about employment discrimination cases.[268] At hearings and in focus groups, a

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[266] From 1992 to 1995, we found six such cases that were appealed, five of which were reversed.

[267] It would be worthwhile, however, to redo the study using a longer time frame.

[268] Not every sexual harassment claim is made in the employment context, however. Cases in the Second Circuit have also come from prisoners accusing guards of harassing them or from academic institutions.

variety of disturbing stories were related. In rare instances, blatantly sexist statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another case, a judge was alleged to have conveyed through his facial expressions and words his thoroughgoing skepticism about the validity of the plaintiff's claim.[269] Although that plaintiff ultimately won a large judgment, the plaintiff's attorney recalls that the judge "made his views quite clear. It was clear to our client that that was the judge's attitude, and she was furious,

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absolutely furious. She didn't think he had any objectivity whatever."[270] Another lawyer, a defense counsel in

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[269] Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

[270] Much has been written on the credibility problems experienced by victims of sexual harassment and abuse. See, e.g., Lynn Hecht Schafran, Credibility in the Courts: Why Is There a Gender Gap?, Judges' J. 5 (Winter 1995). A recent California case illustrates the problem. An appellate court set aside the verdict of a trial judge in a sexual harassment case on the ground that the proceedings below were tainted by the judge's dislike of such cases and his unwillingness to treat as credible quite compelling testimony by a plaintiff about her experience. The Court found that the trial judge was animated

employment cases, commented, apparently without irony, that in his experience, judges actually like sexual harassment cases because they find them "entertaining."

A further reason to look at this subset of cases was the fact that the Ninth Circuit gender report had also found sexual harassment litigation to be an especially problematic area. In that report twenty-six cases that generated appellate decisions were found over one five-year period; of these, twenty-three had been won below by the defendant.[271] The Ninth Circuit reversed more than 50% of the defendants' wins in whole or in part. The report also found that about half of all reported sexual harassment cases at the district court level were disposed of either by a motion to dismiss or by granting the defendant's motion for summary judgment.[272]

To compare the situation in the Second Circuit, a

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by gender bias both because he "conveyed the sense [that] he considered sexual harassment cases 'detrimental to everyone concerned' and a misuse of the judicial system" and because his reasons for finding the plaintiff not believable "rests on stereotyped thinking about women and misconceptions of the social and economic realities many women confront." Catchpole v. Brannon, 36 Cal. App. 4th 237, 249, 42 Cal. Rptr. 2d 440, 446, rev. denied, 1995 Cal. LEXIS 5807 (Sept. 14, 1995).

[271] Ninth Circuit Gender Bias Task Force, The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, 67 S. Cal. L. Rev. 745, 885-86 (1994).

[272] Id. at 886.

computerized search was done on Lexis and Westlaw to identify all decided cases involving claims of sexual harassment that were appealed to the Second Circuit from 1990 through 1996.[273] Twenty-six cases were found. Of these, two were

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omitted from this study because they did not actually address harassment in the claims that led to the appeal.[274] Most of the remaining twenty-four cases that made up the study sample were brought under Title VII of the Civil Rights Act of 1964; but a few invoked Section 1983 or Title IX; not all were

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[273] The search for sexual harassment cases decided since January, 1, 1990, generated 26 published and unpublished opinions in cases directly involving plaintiffs' claims of sexual harassment; several others involved harassment indirectly - for example, suits for damages filed by those accused of harassment - and were omitted from the analysis. Of the remaining cases, one was not brought directly by the alleged victim, but rather by her employer. In that instance, the employer had already tried to fire the person responsible for the harassment; the dismissed employee, however, invoked arbitration under a collective bargaining agreement and was ordered reinstated. The case was filed by the employer to seek judicial review of the arbitrator's decision. Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990).

[274] Of the 26 sexual harassment opinions found, one appeal was dismissed for lack of jurisdiction and one involved a motion to substitute the United States for an individual military officer as the defendant. These were omitted from the analysis on the grounds that they too tangentially touched on the substantive issues of concern here.

employment cases.[275] The findings indicate that sexual harassment litigation has become an increasingly common part of the docket of the Second Circuit; all but six of the opinions analyzed issued since 1994; ten of the most recent twenty were decided in a single year, 1996.

What, if anything, do the appellate opinions show about the treatment of sexual harassment cases in the district courts? First of all, it was interesting to note that half of these cases had been disposed of below on either a motion to dismiss or on summary judgment, a result similar to that reported in the Ninth Circuit, and one that is somewhat surprising, considering that these are cases generally agreed to involve a high level of factual complexity.[276] Overall, the defendant prevailed in 66.6% of the cases at the trial court level, and in fully 91.6% of those decided on dispositive

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motions. Where the cases went to trial, plaintiffs won in seven and lost in five; but consistent with other reports, plaintiffs did markedly better before a jury than a judge.[277]

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[275] One of the 24 cases was a Section 1983 claim by a prisoner, and another was a Title IX action by a student against a school.

[276] Of the 24 cases, 13 were disposed of below by summary judgment or by a motion to dismiss; 11 others were tried, either before the bench or a jury.

[277] Of the 12 cases in the sample that went to trial, five were entirely bench-tried, and seven were tried to a jury. Only one jury trial was won by a defendant, and that case was reversed on the ground that the jury instructions were

On appeal, twelve (50%) of the twenty-four appealed decisions were reversed in whole or in part. This would seem to be a high error rate, given the fact that the circuit reversed about 9.8% of all the civil cases appealed to it over the same time period from 1990 to 1996. Of the cases disposed of below on motion, a third were subsequently reversed in whole or in part on appeal.[278]

Because, as noted earlier, reversal rates alone do not tell a very complete story, the cases were further analyzed. One approach was to break the cases down to see whether, on the whole, the reversals favored defendants or plaintiffs - that is, to determine who was the more favored party in terms of the outcome of the appeal. In only two cases where reversals were granted in full or in part did the result entirely or largely favor defendants. In the other ten instances, the outcome substantially favored plaintiffs, either by reversing in favor of the defendant only on minor issues while leaving plaintiffs' victories below substantially intact, or by reversing defendants'

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inadequate. Of the five tried in their entirety to a judge, four were won by defendants; one case among the 12 was tried in part by a jury and in part by a judge and the plaintiff won both halves. The other "success" of a plaintiff in a proceeding before the judge was on damages, following a previous partial reversal of an earlier decision against her, and a remand. The judge then determined that her damage award for retaliatory discharge should be less than $5000; plaintiff appealed again, unsuccessfully. Of the jury trials won by plaintiffs, four were entirely or substantially affirmed by the Court of Appeals, and two reversed in whole or part.

[278] Seven of the 11 pro-defendant rulings were affirmed, and the rest reversed in whole or in part.

wins below outright or in major part.

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TABLE 26: Analysis of Reversals in Sexual Harassment Cases

Reversal in favor of defendant on all or most issues	2
Reversal in favor of defendant on some issues; plaintiff prevails on main issues	3
Reversal in favor of plaintiff on all or most issues	7
Reversal in favor of plaintiff on some issues - defendant prevails on main issues	0

The findings from two dozen cases obviously do not provide enough data from which to draw any firm conclusions one way or another about whether sexual harassment claims receive short shrift at the trial level. But these preliminary results do suggest reasons for concern, and provide cause for further study. In addition, even this small sample of cases offers some useful insights.

To begin with, a reading of the cases demonstrates at least one obvious reason that both plaintiffs and their counsel are likely to find these cases frustrating: in truth, under existing substantive federal law, even fairly egregious instances of sexual harassment are often simply beyond remedy.[279]

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[279] For example, at least two cases involved claims against union officials and were unsuccessful because the courts found that the Local's office rather than the union was the employer for purposes of Title VII and that the office did not meet the statutory 15 employee minimum. Kern v. City of Rochester, 93 F.3d 38 (2d Cir. 1996), cert. denied, 117 S. Ct. 1335; Yerdon v. Henry, 91 F.3d 370 (2d Cir. 1996). Difficulties in imputing knowledge to an employer is also a possible barrier to recovery in cases where the harassment is otherwise well-established. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992).

Although this is a problem that cannot necessarily be cured by the courts, the distress of litigants and their attorneys ought not be worsened by an unsympathetic and dismissive attitude toward the legitimacy of their claim on the courts' time and attention.

Unfortunately, we found evidence in some cases that such attitudes sometimes do taint the proceedings, just as the anecdotal comments from focus groups, hearings and surveys indicated that they might. In a number of instances, a careful reading of the appellate opinions suggests that some trial judges exhibited impatience with these claims, as well as stereotyped thinking about the

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seriousness or the reality of the sexual harassment. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who was not fired and who got promotions and pay raises during the period in which her supervisor demanded sexual favors, could nevertheless have suffered legally cognizable emotional injuries. In another case, the lower court's handling of it suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the egregious misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge unexpectedly awarded summary judgment to the defendant on the merits - a ruling requested by neither side, and made despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

Thus, this brief look at reported decisions in appealed cases raises concerns that these cases are treated by trial judges with less than uniform seriousness and respect. And yet studies in recent years have shown over and over that sexual harassment is a fact of life for a significant part of the population of

working women. As noted by a recent New York State task force, and by the Ninth Circuit gender report, even among a sophisticated and powerful group of women - lawyers - up to two-thirds report that they have been the recipient of unwanted sexual advances from clients, colleagues or superiors in their professional life.[280]

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It is difficult to dismiss out of hand, therefore, the allegations we heard that judges sometimes engage in stereotyped thinking about these cases, or treat them as too "small potatoes" to be worth their energy and time. In response, it should be recalled that no external calculus establishes the extent of the rightful claim on judicial time that any class of case should make. The dollar value of the case or the importance on the national or world stage of the actors in the dispute obviously can influence a judge's evaluation of whether or not a case is "important." But whether a case is

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[280] The Governor's Task Force, Sexual Harassment: Building a Consensus for Change 33-34 (1993). The Governor's report cited a 1989 survey by the National Law Journal for its estimate that the problem was experienced by 60% of women lawyers. A study in Connecticut by the state bar also revealed a significant amount of sexual harassment experienced by lawyers. Committee on gender bias in the Profession, Connecticut Bar Association. Gender Issues in the Legal Profession, 69 Conn. B.J. 207 (1995). The Governor's report estimates that, overall, half of all working women experience harassment in their work lives. Governor's Task Force, supra, at 30. The Ninth Circuit study found that a third of lawyers reported having been sexually harassed. Ninth Circuit Report, supra note 271, at 829-30.

worth the time it takes is also a function of the values and life experiences that a judge brings to the case. One could argue plausibly that cases involving individual rights and protection against discrimination, even if small and affecting only a single individual, are more rather than less deserving of the attention of the federal bench, and more in need of its expertise, than a large commercial case which the parties, because they are major social actors, could probably get resolved fairly in a variety of fora. The point is simply that when a case is properly before a federal court, a judge's belief that it is too trivial for his or her attention can too easily transmute itself into actual unfairness to a litigant - in this instance, a result that disproportionately disadvantages both women and members of minority groups; this is a problem that deserves attention.